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No. 81-

IN THE

# Supreme Court of the United States

**October Term, 1981**

S. DAVID LITMAN and IRVING M. PORTNOY,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

**Is an order denying a motion to dismiss an indictment on the ground that the defendant's Fifth Amendment Indictment Clause right has been violated an appealable order under 28 U.S.C. §1291?**

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S. DAVID LITMAN and IRVING M. PORTNOY,
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UNITED STATES OF AMERICA,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, S. David Litman and Irving M. Portnoy, respectfully pray that a Writ of Certiorari issue to review the Judgment entered September 28, 1981, and the Opinion of the United States Court of Appeals for the Third Circuit filed in this proceeding on September 28, 1981, which affirmed an Order of the United States District Court for the Western District of Pennsylvania entered on March 16, 1981 denying a motion to dismiss an indictment.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Gibbons and Hunter, C.J. and Gerry, D.J.) is not yet reported and is reproduced as Appendix A to this petition (A-1 through A-6). The order of the Court of Appeals denying a petition for rehearing is not reported and appears as Appendix B to this petition. The judgment order of the Court of Appeals is also unreported and appears as Appendix C to this petition.

The opinion of the United States District Court for the Western District of Pennsylvania (Weber, Chief Judge) in support of denial of defendants' motion to dismiss the indictment is unreported and appears as Appendix D to this petition. The order of the District Court denying the motion to dismiss is unreported and appears as Appendix E to this petition.

## JURISDICTION

On March 16, 1981, the United States District Court denied a motion to dismiss an indictment returned against petitioners by a grand jury. Petitioners appealed that order to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291.

On September 28, 1981, the Court of Appeals dismissed the appeal as taken from an interlocutory order.

A petition for rehearing was timely filed and denied on October 28, 1981.

This Court has jurisdiction to review the order of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger....

Section 1291 of Title 28, United States Code, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of

the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

### (a) The Indictment

Petitioners S. David Litman and Irving M. Portnoy were indicted by a grand jury in the United States District Court for the Western District of Pennsylvania on February 3, 1981 and charged with conspiracy and multiple counts of mail fraud said to have arisen from an alleged scheme to defraud insurance companies.

The indictment charges that petitioners combined with physicians to furnish false or inflated medical bills to insurance carriers in connection with personal injury damage claims.

### (b) The Motion to Dismiss and Findings

Petitioners filed a motion to dismiss the indictment and alleged that serious prosecutorial misconduct had occurred, including repeated breaches of grand jury secrecy in violation of Federal Rule of Criminal Procedure 6(e) arising from the grand jury's having appointed as an "agent" an employee of a private corporation, the "Insurance Crime Prevention Institute," or "I.C.P.I.", organized by various casualty insurance carriers for the purpose of prosecuting insurance fraud.

The District Court held hearings on petitioners' motion to dismiss. On March 16, 1981, the District Court (Weber, Chief Judge) issued its Findings and Opinion which concluded that "there have been repeated and continued violations of the provision of Federal Rule of Criminal Procedure 6(e)(2) from...August 1, 1977 until the return of the indictment..." App. at D-10. These violations all arose from the pervasive involvement of Daniel B. Saccani, the I.C.P.I. employee, in the grand jury investigation over a period of more than three years.

The District Court found that Mr. Saccani became involved in the grand jury investigation in mid-1977. He met regularly with United States Postal Inspectors and with members of the United States Attorney's Office to discuss progress of the investigation and reported events on a daily basis to his employers, including the expected dates of grand jury presentments, issuance of subpoenas by the grand jury, and summaries of meetings with the prosecutors.

On January 6, 1978, Mr. Saccani appeared before a then sitting grand jury, was sworn, identified himself as an employee of the I.C.P.I, explained the function of his employer, and was appointed by the grand jury as its "agent" for the purpose of assisting prosecutors in the investigation.

Mr. Saccani was intimately associated with the grand jury investigation. He accompanied Postal Inspectors on their interviews of potential grand jury witnesses. He had access to memoranda of interviews with potential witness. He served subpoenas duces tecum on grand jury witnesses. He had access to all documents subpoenaed by the grand jury. Acting on instructions from the U.S. Attorney's Office, he stationed himself outside the grand jury room, met grand jury witnesses as they arrived pursuant to subpoena, and reviewed their testimony with them prior to their appearing before the grand jury. He then introduced the grand jury witnesses to an Assistant U.S. Attorney, who conducted the examination inside the grand jury room.[1]

Although after being appointed "agent" of the grand jury Mr. Saccani was never physically present within the grand jury room and although he testified that he never was provided with

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[1]The District Court made no finding that Mr. Saccani met grand jury witnesses outside the grand jury room and prepared them to testify. The record created by the District Court establishes that this occurred and the Government does not contend to the contrary.

a transcript of the testimony of any grand jury witness, he admitted that "I pretty much knew what they were going to say before they went in. . .," and he testified that he learned subsequent to their appearances that their testimony had been in agreement with their pre-testimony interviews.

Mr. Saccani was permitted to review a letter drafted by a U.S. Postal Inspector and sent to the U.S. Attorney's Office. That letter recited evidence developed in the case, including grand jury testimony.

On September 22, 1980, Saccani attended a meeting with the U.S. Attorney and Postal Inspectors called for the purpose of deciding whether to seek an indictment in this case. Saccani at that meeting doubtless heard discussions of the grand jury testimony of certain witnesses.

Sometime after the meeting of September 22, 1980, the U.S. Attorney first questioned the propriety of Mr. Saccani's involvement in the investigation. The U.S. Attorney was informed by an assistant that Saccani's involvement had been "pretty extensive and he had been there for a long time." This question of the legality of Saccani's involvement was prompted by the filing of the United States Court of Appeals' decision in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), which held the disclosure of grand jury materials to an Insurance Crime Prevention Institute employee was illegal.

On November 15, 1980, the U.S. Attorney wrote a "Report of Loss, Compromise or Suspected Compromise" to the Assistant Attorney General for Administration of the Department of Justice and reported that "[t]here are any number of possible 6(e) problems arising out of the lawyer-doctor Insurance Mail Fraud Investigations." He recited that the investigator's presence at pre-grand jury debriefings made the investigator "aware of the full extent of [a witness's] testimony without reference to the grand jury transcript."

Although Saccani had undertaken on January 6, 1978, when appointed an "agent" of the grand jury, not to disclose grand jury information, he in fact followed a regular practice of keeping I.C.P.I. apprised of the progress of the lawyer-doctor investigation. He relayed to his employer the names of potential grand jury witnesses, the fact of issuance of subpoenas, summaries of meetings with Postal Inspectors and members of the U.S. Attorney's Office, and the intentions of the U.S. Attorney with respect to seeking indictments from the grand jury. On one occasion (April, 1980), he forwarded to his superior at I.C.P.I. a chart in which he detailed the lawyer-doctor investigation, marked in red the cases in which convictions had been obtained, and stated: "We look forward to the day when all the blocks on the chart appear in red."

Saccani's breaches of grand jury secrecy were understandable in that he possessed a complete misunderstanding of the historical function of the grand jury in American law. He thought the grand jury existed only to preserve the testimony of witnesses who appeared before it:

A. Yes, it wasn't a grand jury investigating David Litman. It was the postal inspectors investigating David Litman.

Q. It wasn't the grand jury investigating him?

A. No, it was the postal investigators.

Q. What did you perceive as the function of the grand jury in the investigation?

A. The grand jury function would have been to preserve the evidence.

Q. Preserve the evidence?

A. Right.

Q. So the witness would just run there to say under oath...

A. What they had already told us originally in the memorandums of interview.

Notwithstanding all of the above, the District Court, finding that petitioners had suffered "no prejudice," denied the motion to dismiss.

**(c) Appeal to the Third Circuit**

Petitioners filed a joint appeal to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291. The Government filed a motion to dismiss for lack of jurisdiction. A motions panel deferred decision on the Government's motion to dismiss until argument on the merits.

On September 28, 1981, a panel of the Third Circuit (Gibbons and Hunter, C.J. and Gerry, D.J.) filed an opinion and entered a judgment dismissing the joint appeal for lack of jurisdiction.

A timely-filed petition for rehearing was denied. Petitioners subsequently obtained from the Third Circuit a stay of issuance of its formal mandate until December 4, 1981 to enable petitioners to file this Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

**(a) The Constitutional Right Asserted**

The panel of the United States Court of Appeals for the Third Circuit wrote that "[a]ppellants tacitly admit that they can point to no established privilege protecting them from facing trial...." App. at A-5. Petitioners point, however, to the Fifth Amendment of the U.S. Constitution, which provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...

Implicit in the holding below is the principle that petitioners' Fifth Amendment Indictment Clause rights were not violated

where the United States Attorney caused an employee of the victim or victims of an alleged crime under investigation to be appointed an "agent" of the grand jury and thereafter permitted that victims' employee to become totally emeshed in the investigation to the point of having access to all documents subpoenaed, of meeting grand jury witnesses outside the grand jury room prior to their testifying, and of meeting with the United States Attorney, his staff, and federal officials to discuss whether or not indictment should be sought.

While admittedly there appears to be no reported case in which a victims' representative, with approval of the prosecutor, so thoroughly penetrated a grand jury investigation, petitioners assert that such conduct implicates Fifth Amendment Indictment Clause-protected values sufficiently to support pretrial review.

Historically and in practice, the grand jury has stood as a bulwark of freedom, protecting citizens against arbitrary and oppressive prosecutions. The historic role of the grand jury was discussed by Mr. Justice Powell in *United States v. Calandra*, 414 U.S. 338, 342-43, 94 S. Ct. 613 (1974):

> The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that that provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v. United States, 350 U.S. 359, 361-362, 76 S. Ct. 406, 100 L.Ed. 397 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed

> and the protection of citizens against unfounded criminal prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686-687, 92 S. Ct. 2646, 2658-2659, 33 L.Ed. 2d 626 (1972).

Writing for this Court in *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 1373 (1962), former Chief Justice Warren emphasized the grand jury's role in securing protection against vindictive prosecution:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious, and oppressive persecution; it serves the invaluable function in our society of standing between the accuser, and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason *or was dictated by an intimidating power or by malice and personal ill will.* (Emphasis supplied.)

In *United States v. Dionisio*, 410 U.S. 1, 17, 93 S. Ct. 773 (1973), Mr. Justice Stewart referred to the grand jury as "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor."

Although the United States Court of Appeals for the Third Circuit altogether failed to respond to petitioners' argument that their Fifth Amendment Indictment Clause rights had been infringed by the flagrantly unlawful conduct revealed by the evidence before the District Court, this Court has never in the past regarded the Fifth Amendment Indictment Clause to be devoid of substance.

This Court, for example, has always enforced the command of the Fifth Amendment by preventing the prosecutor or the trial court from materially amending the charging terms of an indictment. In *Stirone v. United States*, 361 U.S. 212, 274, 80 S. Ct. 270, 4 L.Ed.2d 252 (1960), this Court, following *Ex Parte Bain*, 121 U.S. 1, 7 S. Ct. 781, 30 L.Ed. 849 (1887), wrote as follows:

> The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution...which the grand jury did not charge.

See also *United States v. Cusmano*, 659 F.2d 714, 717 (6th Cir. 1981) ("[T]here is a per se rule prohibiting judicial amendments to the terms of an indictment"); *Wilson v. Jago*, 558 F.2d 330, 334 (6th Cir. 1977).

Similarly, this Court has been sensitive to claims of racial discrimination in selection of the grand jurors. In *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272 (1977), this Court affirmed issuance of habeas corpus in favor of a defendant indicted by an illegally-constituted grand jury. See also *Rose v. Mitchell*, 443 U.S. 545, 99 S. Ct. 2993 (1979) (indictment dismissal proper remedy where defendant indicted by grand jury chosen in racially discriminatory manner). Congress, in implementing the Fifth Amendment Indictment Clause guarantee, has made selection of the grand jurors subject to the Jury Selection and Service Act of 1968, 28 U.S.C. §1861 et seq., and has made indictments returned by grand juries constituted in violation of that statute subject to dismissal. See *United States v. Bearden*, 659 F.2d 590 (5th Cir. 1981). All of these decisions and statutes give content to the Fifth Amendment Indictment Clause guarantee.

This Court, in promulgating Federal Rule of Criminal Procedure 6(e) ("The Grand Jury. Recording and Disclosure of Proceedings"), was obviously seeking to protect the grand jurors from impermissible outside influence. In *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 99 S. Ct. 1667 (1979), this Court wrote:

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. See, e.g., United States v. Procter & Gamble, 356 U.S. 677, 78 S. Ct. 983, 2 L.Ed.2d 1077 (1958). In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings....There also would be the risk that [private individuals] would try to influence individual grand jurors.... For all of these reasons, courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury.
>
> 99 S. Ct. at 1672-1673.

In the single prior recorded case in which an I.C.P.I. agent succeeded in infiltrating an ongoing grand jury investigation as part of the scope of his private employment, a United States District Court soundly condemned the intrusion as unauthorized and in violation of F.R.Crim.P. 6(e):

> This Court is further concerned with the obvious implication of this apparently new policy of the Department of Justice. *Permitting the victim of a crime, or his agent, to participate in, coordinate and potentially direct a grand jury investigation into that crime raises serious problems.* The policy could significantly impair the independence and impartiality required of the grand jury in the performance of its function.
>
> *United States v. Tager*, 506 F. Supp. 707, 726 (D Kan. 1979). *aff'd*, 638 F.2d 167 (10th Cir. 1980).

This Court has always been sensitive to the constitutional requirement that critical steps in the criminal process be taken by a neutral and detached individual or body. See, e.g., *Ward v. Monroeville*, 409 U.S. 57, 62, 93 S. Ct. 80, 84 (1972) (petitioner denied right to neutral and detached judge where a major portion of town's income came from penalties imposed

by town's mayor sitting as judge); *Coolidge v. New Hampshire,* 403 U.S. 443, 449, 91 S. Ct. 2022 (1971) (invalidating warrant executed by active participant in the investigation, not a "neutral and detached magistrate"); *In re Murchison,* 349 U.S. 133, 134, 75 S. Ct. 623, 624 (1955) ("The due process requirement of an impartial tribunal [is violated] where the same judge presiding at the contempt hearing had also served as the 'one man grand jury' [in the secret hearings] out of which the contempt charges arose"); *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S. Ct. 437, 441 (1927) (invalidating fine for illegal possession of intoxicating liquor where mayor received a share of such fines). The *Coolidge* decision makes it clear that the requirement of independence and impartiality is not limited to trial situations, but extends through all preliminary proceedings where a neutral decision is mandated, even to the issuance of an initial warrant.

The District Court, while having found "repeated and continued violations of the provisions of Federal Rule of Criminal Procedure 6(e)(2)," App. at D-10, nevertheless found that there was "no evidence of prejudice . . . arising through disclosure of any matters occurring before the grand jury." *Id.*

This Court has on a number of occasions dealt with the question of "prejudice" and the presence of impermissible external influences on the operation of the judicial system. In *Turner v. State of Louisiana,* 379 U.S. 466, 85 S. Ct. 546 (1965), two key witnesses at trial were also deputy sheriffs who doubled as jury shepherds during the trial. Although the deputies swore that they had not talked to the jurors about the case, this Court nevertheless held that relief was constitutionally required:

> [E]ven if it could be assumed that the deputies never did discuss the case directly with any members of the jury, *it would be blinking reality not to recognize the extreme prejudice inherent in this continual association.*
>
> 379 U.S. at 473 (emphasis supplied.)

Similary, in *Estes v. State of Texas,* 381 U.S. 532, 85 S. Ct. 1628 (1965), this Court set aside a conviction without requiring a showing of prejudice:

> It is true that in most cases involving claims of due process deprivations we require a showing of identificable prejudice to the accused. *Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.*
>
> 381 U.S. at 543-544.

See also *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507 (1966); *In re Murchison,* 349 U.S. 133, 136, 75 S. Ct. 623 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness"); *Rideau v. State of Louisiana,* 373 U.S. 723, 726, 83 S. Ct. 1417 (1963).

It is beyond argument that the prospect of the I.C.P.I. agent, who informed his superiors that he looked forward to the day when all subjects of the investigation would be convicted, huddling with subpoenaed grand jury witnesses outside the grand jury room, having access to all documents of the grand jury investigation, and being privy to conversations with the prosecutors at which grand jury materials were freely discussed, presents "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. State of Texas, supra.*

The failure of the Third Circuit to have recognized and remedied the Fifth Amendment Indictment Clause violation presented by this case, therefore, is probably itself not in accord with the prior decisions of this Court which give substantive content to the Fifth Amendment and prevent external influences from infecting the judicial process.

The question presented to this Court for its review, however, is not whether in fact petitioners' Fifth Amendment Indictment Clause rights have been violated on the circumstan-

ces revealed in the District Court. The question is whether the Third Circuit had the jurisdiction to make that determination on a pretrial appeal. Petitioners will now turn to that question and demonstrate that it merits review by this Court.

**(b) The Jurisdictional Issue Presented for Review**

Petitioners recognize that the power of the United States Court of Appeals to review an order of the District Court by appeal as of right derives from Congress under 28 U.S.C. § 1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

Petitioners further recognize that "[f]inality as a condition of review is an historic characteristic of federal appellate procedure," *Cobbledick v. United States,* 309 U.S. 323, 324-25, 60 S. Ct. 540 (1940). The requirement of "finality" is not, however, inexorable. As Professor Moore notes, "Sound as the final judgment rule may be as a rule of general application, it will work injustice if inexorably applied, and in truth it is subject to many qualifications and exceptions." 9 Wm. Moore, *Moore's Federal Practice* ¶ 110.07, at 109 (2d ed. 1980).

Prior to 1977, the "finality" doctrine was applied with special rigor in criminal cases. See *DiBella v. United States,* 309 U.S. 121, 82 S. Ct. 654 (1962). Only one federal case at that time permitted appeal from an order which was not "final" in the sense of terminating a federal criminal action. *Stack v. Boyle,* 342 U.S. 1, 72 S. Ct. 1 (1951) (upholding appellate jurisdiction to review order denying application for reduction in bail).

In *Abney v. United States,* 431 U.S. 651, 97 S. Ct. 2034 (1977), this Court, however, applied the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S. Ct. 1221 (1949), and held that an order denying a motion to dismiss an indictment on Double Jeopardy grounds was appealable as a "final decision" of the district court. In the *Cohen* case, this Court had held that the statute, 28 U.S.C. §1291, was to be given a "practical rather than a technical construction," 69 S. Ct. at 1226, and then had set forth three criteria for the appealability of "collateral orders" which clearly lack the normally requisite finality: first, the decision below must have fully disposed of the question raised; second, the decision must be other than a "step toward final disposition on the merits" but rather must be "completely collateral" to the merits of the case proper, *id.* at 1226; and third, the decision below must have involved an important right which would be "lost, probably irreparably" if review had to await final judgment. *Id.*

Applying the *Cohen* "collateral order" criteria in *Abney,* this Court unanimously agreed that a Double Jeopardy claim made and rejected before trial was immediately reviewable by appeal. This Court emphasized that the constitutional guarantee against Double Jeopardy was in part a guarantee against being tried the second time and that a reservation of review of that question until after trial would fail to vindicate the constitutional right.

This Court has on two occasions considered the applicability of the "collateral order" doctrine in criminal appeals. In *United States v. McDonald,* 435 U.S. 850, 98 S. Ct. 1547 (1978), this Court held that an order denying a motion to dismiss an indictment on Sixth Amendment "speedy trail" grounds was not appealable. The *McDonald* Court distinguished *Abney* by observing that denial of the motion was not a "complete, formal and, in the trial court, final rejection" of defendants' claim, 98 S. Ct. at 1551, because the resolution of a

speedy trial claim "necessitates a careful assessment of the particular facts of the case" and that this is best done "only after the relevant facts have been developed at trial." 98 S. Ct. at 1551. Similarly, the decision below was not completely collateral to the merits of the case proper, since the extent to which delay had prejudiced the defendant was "intertwined" with the facts and evidence at trial. Finally, the constitutional rights in *McDonald* was not a right not to be tried, but rather a right against pretrial delay. Permitting the trial to occur before reviewing the speedy trial question would not, therefore, leave the constitutional right unvindicated.

In *Helstoski v. Meanor,* 442 U.S. 500, 99 S. Ct. 2445 (1979), this Court held that an order denying a motion to dismiss founded on the Speech and Debate Clause was appealable. One purpose of the Speech and Debate Clause, this Court observed, was to protect members of Congress not only from trial "but from the burden of defending themselves," and failure to provide immediate review would cause a substantial portion of the constitutional guarantee to be irrevocably lost.

Application by the Courts of Appeals of the *Abney-Helstoski-McDonald* line of decisions to orders denying motions to dismiss based on preindictment defects has produced considerable confusion and lack of agreement which this Court should now act to resolve.

The two most nearly on point decisions are *United States v. Yellow Freight Systems, Inc.,* 637 F.2d 1248 (9th Cir. 1980), *cert. denied,* 50 U.S.L.W. 3245 (Oct. 5, 1981), and *In re November 1979 Grand Jury (Velsicol Chemical Corp.),* 616 F.2d 1021 (7th Cir. 1980).

In the first, *United States v. Yellow Freight Systems, Inc.,* 637 F.2d 1248 (9th Cir. 1980), *cert. denied,* 50 U.S.L.W. 3245 (Oct. 5, 1981), the defendant-corporations had been charged in informations (and not by indictment) with violation of the

Elkins Act, 49 U.S.C. §41(1) (unlawful rate concessions). In a motion to dismiss, the defendants argued that they had been charged with an "infamous crime" which, under the Fifth Amendment, required a grand jury indictment. The district court denied the motion.

On appeal, the Ninth Circuit had little difficulty in holding that under the "collateral order" doctrine the question of whether defendants' right to be prosecuted only by grand jury indictment had been violated was immediately reviewable, notwithstanding the lact of "finality":

> Yellow Freight and Duncan Ceramics contend that they have been charged with an infamous crime for which they may not, under the indictment clause of the Fifth Amendment, be "held to answer" except upon grand jury indictment. This claim meets all three of the standards for immediate appealability. Denial of defendants' motion completely and finally determined their claim in the trial court. Allowing the trial to progress so that facts may develop will not facilitate consideration of their claim. Cf. United States v. McDonald, 435 U.S. 850, 98 S. Ct. 1547, 56 L.Ed.2d 18 (1978) (no immediate appeal of denial of speedy trail claim under Sixth Amendment because determination of merits of claim depends on circumstances surrounding trial.) Second, the entitlement of Yellow Freight and Duncan Ceramics to an indictment before prosecution is wholly collateral to and independent of the issue of their guilt on the underlying charges. Finally, the claim involves a right that would be irretrievably lost if the defendants were forced to stand trial before appeal. One purpose of the indictment clause is to shield defendants from unwarranted prosecutions for serious crimes. *Wood v. Georgia,* 370 U.S. 375, 390 82 S. Ct. 1364, 1373, 8 L.Ed.2d 569 (1962); *Stirone v. United States,* 361 U.S. 212, 218 & n.3, 80 S. Ct. 270, 273 & n.3, 4 L.Ed.2d 252

> (1960); *Gaither v. United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969); *United States v. Cox*, 342 F.2d 167, 170 (5th Cir.), *cert. denied*, 381 U.S. 935, 85 S. Ct. 1767, 14 L.Ed.2d 700 (1965); see also *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). Like the contentions held immediately appealable in Abney and Griffin, therefore, this claim "involves a right to be free from prosecution itself, rather than merely to be free from subsequent conviction." *Griffin*, 617 F.2d at 1345; see *Abney*, 431 U.S. at 660-62, 97 S. Ct. at 2040-41. We therefore deny the motion to dismiss with respect to this claim.
>
> 637 F.2d at 1251.

The *Yellow Freight Systems* case, which petitioners suggest is correctly decided, stands for the proposition that the Fifth Amendment Indictment Clause right to be indicted by a grand jury for "infamous crimes" is the kind of specific guarantee which, like the Speech and Debate Clause or the Double Jeopardy Clause, cannot be vindicated if appellate review is reserved until after trial. As such, it is contrary to the holding of the Third Circuit in this case.

In *In re November 1979 Grand Jury (Velsicol Chemical Corp.)* case of the Seventh Circuit is similar. A grand jury in 1977 returned an indictment against Velsicol and certain officers charging various offenses. The defendants moved to dismiss and, in an evidentiary hearing, demonstrated that there had been numerous instances of prosecutorial abuses involving the grand jury investigation. The District Court granted the motion to dismiss. *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (Leighton, J.). Velsicol then, at a later time, moved for an order to terminate a renewed investigation by a different grand jury looking into the same matters. The Seventh Circuit rejected the Government's argument that the order below denying the motion was unappealable:

> In response to an inquiry of this Court, the Government argued initially that the instant appeals are from non-final orders and should be dismissed for lack of jurisdiction. Although as a general matter appeals from orders regarding ongoing grand jury proceedings are not favored . . . the Supreme Court has adopted a flexible view of finality that takes into account of exceptional circumstances. [Citation omitted.] This case falls within the exceptional category.
>
> * * *
>
> Appealability now is warranted because Velsicol's arguments raise the prospect of a virtually unique kind of injury arguably not remediable by a future review.
>
> 616 F.2d at 1024-1025.

Next after *Yellow Freight Systems, Inc.* and *Velisicol Chemical Corp.* (which involve claims of violation of the Fifth Amendment grand jury indictment right), petitioners suggest that the most relevant decisions are *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 167 (1980), and *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980).

In *Griffin*, the Ninth Circuit, applying the *Abney-McDonald—Helstoski* reasoning, found that an order denying a motion to dismiss was appealable where the ground advanced for dismissal was the Fifth Amendment Due Process right to be free from vindictive prosecution. The Ninth Circuit observed that denial of the vindictive prosecution claims in the trial court was a complete and final determination, that the question was wholly collateral to the merits of the prosecution itself, and that the right to be free from vindictive prosecution "would be irreparably lost if appellate review had to await the final outcome at trial." 617 F.2d at 1346.

The similarity between appellants' substantive claim—to be free from prosecution begun by a grand jury indictment

where the grand jury had appointed as its "agent" a wholly private party who was a paid representative of the victims of the alleged crime—and the claim in *Griffin* and *Burt* is undeniable.

This is not to say that all defects or irregularities in grand jury proceedings leading to an indictment entitle the defendant to an interlocutory appeal from denial of a motion to dismiss. For example, in *United States v. Garner*, 632 F.2d 758 (9th Cir. 1980), the defendant contended in a motion to dismiss that he had been indicted by a grand jury which had not heard all the evidence firsthand. After reviewing at length this Court's criminal "collateral order" decisions *(Abney, McDonald, Helstoski)*, the Ninth Circuit agreed that "[t]he right to an indictment by a grand jury is, therefore, intended to insure that one is not 'held to answer' for an infamous crime unless an independent body standing between the prosecutor determines that the accused shall be required to do so." 632 F.2d at 765. The Ninth Circuit in *Garner*, however, declined to hold that all allegations of grand jury irregularities amounted to Fifth Amendment violations:

> Our conclusion is premised primarily upon pragmatic considerations. The "collateral order" exception should be narrowly construed so that the exception does not swallow the finality rule. Although one may dispute the wisdom of the finality rule, Congress has determined that, in most instances, a "final decision" is a predicate to the exercise of federal appellate jurisdiction.
>
> * * *
>
> To hold the order here in question appealable would open the possibility for a pretrial appeal in nearly every criminal case. A claim like the one appellant is making—that the evidence before the grand jury was not adequate and competent, i.e. that it was hearsay evidence—would be available in nearly every instance.
>
> 632 F.2d at 666.

There are a number of decisions of the Courts of Appeals which, like *Garner* in the Ninth Circuit, stand for the proposition that preindictment irregularities of a less than constitutional dimension are not appealable pretrial. See, e.g., *United States v. Sears, Roebuck and Company*, 647 F.2d 902 (9th Cir. 1981) (preindictment delay and estoppel not appealable under *Abney* reasoning); *United States v. Linton*, 655 F.2d 930 (9th Cir.1980) (prosecutorial misconduct and alleged perjury before grand jury not appealable pretrial); *United States v. Bendis*, 657 F.2d 1025 (9th Cir.1981). All of these cases involve the assertion of pretrial irregularities of less than constitutional dimension.

The infiltration into an ongoing grand jury investigation of any employee of the victims of the alleged crime under investigation, as occurred here, "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. State of Texas, supra*, 381 U.S. at 542-543. The magnitude of the breach of secrecy presented by this case takes it out of the realm of "preindictment irregularities" such as were involved in the foregoing cases and elevates this case to the level of a Fifth Amendment constitutional violation.

On the question whether prosecutorial vindictiveness can be reviewed pretrial under 28 U.S.C. §1291 the cases are in hopeless conflict. The Ninth Circuit has repeatedly held that such preindictment or preinformation vindictiveness by the prosecutor violates the commands of the Due Process Clause of the Fifth Amendment and is reviewable pretrial as a matter of right. See, e.g., *United States v. Griffin*, 617 F.2d 1342 (9th Cir.1980), *cert. denied*, 101 S. Ct. 167 (1980); *United States v. Burt*, 619 F.2d 831 (9th Cir.1980); *United States v. Shaw*, 655 F.2d 168 (9th Cir.1981); *United States v. Wilson*, 639 F.2d 500 (9th Cir.1981).

The District of Columbia Circuit and the Fifth Circuit, however, categorically disagree with the above decisions. In *United States v. Brizendine*, 659 F.2d 215 (D.C. Cir.1981), the court held (per J. Skelly Wright, C.J.) that prosecutorial vindictiveness could not be appealed pretrial as a matter of right under 28 U.S.C. §1291 and stated that "[w]e are not bound by the Ninth Circuit's approach to interlocutory appeals. We find its reasoning to be unpersuasive...." Similary, in *United States v. Gregory*, 656 F.2d 1132 (5th Cir.1981), the Fifth Circuit expressly refused to follow *Griffin* in the Ninth Circuit and held that claims of prosecutorial vindictiveness were not appealable pretrial.

The Third Circuit in a decision filed shortly before the panel decision in the present case, *United States v. Levine*, 658 F.2d 113 (3rd Cir.1981), accurately distinguished the Ninth Circuit's *Yellow Freight Systems* case from decisions which dealt with claims of vindictive prosecution:

> Distinguishable from the decisions focusing on prosecutorial vindictiveness is United States v. Yellow Freight Systems, Inc., 637 F.2d 1248, 1250-51 (9th Cir. 1980), which held that denial of a claim alleging prosecution of an "infamous crime" by information in violation of the indictment clause of the Fifth Amendment created an immediately appealable order. *There the claim had constitutional dimensions. And like the bail allegations in Stack [v. Boyle], an infringement of the right to indictment by a grand jury could only be vindicated prior to trial.*
>
> *658 F.2d at 126 (emphasis supplied).*

The right which petitioners assert in this case is explicitly created by the Fifth Amendment's Indictment Clause and, as the Ninth Circuit in *Yellow Freight Systems, Inc.* held and as the Third Circuit in *Levine* agreed, that constitutional right is on a par with the Double Jeopardy Clause also found in the Fifth Amendment and the Speech and Debate Clause: all are of a nature such as

to be "lost, probably irreparably" if not vindicated by pretrial review.

As the discussion above indicates, there is considerable conflict among the decisions of the various Courts of Appeals which have considered the appealability of preindictment defects in the institution of criminal prosecutions. This Court should exercise its power, grant certiorari in this case, and act to resolve that conflict.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, David J. Armstrong, a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to Rule 33.2(a) of the Rules of the Supreme Court of the United States I have served the foregoing Petition for Writ of Certiorari on counsel for Respondent by depositing the same in the United States mail, postage prepaid, on December 2, 1981, addressed to:

Thomas A. Daley, Esq.
Asst. U.S. Attorney
Chief Criminal Division
633 U.S. Courthouse & Post Office
Pittsburgh, PA 15219

---

DAVID J. ARMSTRONG

# United States Court of Appeals

FOR THE THIRD CIRCUIT

**No. 81-1444**

UNITED STATES OF AMERICA

v.

S. DAVID LITMAN, ESQUIRE
IRVING M. PORTNOY, ESQUIRE
*Appellants*

(D.C. Crim. No. 81-00016)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued: September 15, 1981
Before: GIBBONS and HUNTER, *Circuit Judges*
and GERRY, *District Judge**
(Opinion Filed: September 28, 1981)

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* Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

**APPENDIX A**

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---

## OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

S. David Litman and Irving M. Portnoy, attorneys in Pittsburgh, appeal from the denial of their motion of dismiss an indictment charging them with conspiracy and eighteen substantive counts arising out of an alleged scheme to defraud insurance companies. The indictment charges that appellants combined with doctors to furnish false and inflated medical bills to the insurance carriers in support of personal injury damage claims. Appellants contend that the participation in the grand jury proceeding of Daniel M. Saccani, a private investigator hired by a consortium of insurance companies, resulted in gross violations of Federal Rule of Criminal Procedure 6(e)(2), and warranted dismissal of the indictment. We

hold that the district court's refusal to grant their motion is not an appealable order.[1]

I.

Since 1977, postal inspectors and the United States Attorney in the Western District of Pennsylvania have pursued an investigation of mail fraud by combinations of lawyers and doctors against casualty insurance companies. The investigation focused particularly on the practice of submitting false and inflated medical reports and bills to the insurance companies by lawyers on behalf of clients referred to cooperating doctors. Throughout the investigations of appellants and of other Pittsburgh-area attorneys and doctors, Daniel M. Saccani, a private investigator employed by the Insurance Crime Prevention Institute, a nonprofit corporation organized by 350 casualty insurance carriers, assisted postal investigators and the United States Attorney for the Western District of Pennsylvania. He was appointed an "agent" of the grand jury for the purpose of aiding in its investigation of mail fraud. Saccani helped obtain documents, assisted at witness interviews, and on occasion overheard discussions between members of the United States Attorney's staff and a postal inspector concerning grand jury material.

In October 1977, grand jury subpoenas duces tecum were issued to five Pittsburgh law firms, including the one with which appellants are associated. An indictment against appellants was returned on February 3, 1981. On February 23, 24, 25, and on March 2 and 3, 1981, the district court held *in camera* evidentiary hearings on the alleged Rule 6(e)(2) violations resulting from Saccani's participation in the grand jury investigations. The district court, in an opinion and order

[1] Appellants also petitioned for a writ of mandamus or prohibition directing the district court to dismiss the indictment. A separate panel of this court denied the petition. Litman and Portnoy v. Weber, No. 81-1526 (3d Cir. April 23, 1981).

dated March 16, 1981, concluded that repeated and continuous violations of Rule 6(e)(2) had occurred, but that dismissal of the indictment was not an appropriate remedy. The district judge found that the violations of grand jury secrecy emanating from Saccani's cooperation did not result in any prejudice to the appellants.

II.

Denial of a motion to dismiss an indictment is a collateral order which may not be appealed unless the order has conclusively determined the claim, has resolved an issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment because the right at issue would be irreparably lost were the case to proceed to trial. *Helstoski v. Meanor*, 442 U.S. 500 (1979), *Abney v. United States*, 432 U.S. 651 (1977); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *United States v. Levine*, No. 80-2648 (3d Cir. Aug. 17, 1981). The Supreme Court has identified only two instances in which denial of a motion to dismiss an indictment is immediately appealable. In *Abney, supra*, the Court held a pretrial order rejecting defendant's double jeopardy claim satisfied the three prerequisites to appealability of a collateral order. In *Helstoski, supra*, the Court held a claim invoking the constitutional Speech and Debate Clause privilege met the requirements of collateral finality. *Cf. United States v. MacDonald*, 435 U.S. 850 (1978) (denial of a motion to dismiss indictment on speedy trial grounds held nonappealable).

As this circuit recently noted in *United States v. Levine, supra*, the *Abney-Helstoski* exceptions to the final judgment rule derive from the nature of the right asserted: in both cases, defendants invoked a constitutional privilege not to be tried. Post conviction relief would in fact afford no relief, for the rights at stake protected not only against conviction, but against facing trial at all. Appellants in this case can invoke no

right not to be tried. Hence, whether or not the order rejecting their motion to dismiss the indictment represents a complete and final disposition of appellants' Rule 6(e)(2) claim which trial on the merits would not develop further, appellants fail to satisfy the third element of the collateral finality rule as applied in criminal cases.

Appellants tacitly admit that they can point to no established privilege protecting them from facing trial, but request that we follow the Ninth Circuit in adding to the Supreme Court's short list of collateral order exceptions a rule permitting immediate appealability where there has been extreme prosecutorial misconduct. *See United States v. Griffin,* 617 F.2d 1342 (9th Cir. 1980); *United States v. Burt,* 619 F.2d 831 (9th Cir. 1980). *But see, United States v. Brizendine,* No. 81-1196 (D.C. Cir. July 17, 1981) (holding that a claim of selective prosecution may be adequately remedied at post-conviction stage).

While this argument is very attractive, it is foreclosed to us in this case by virtue of a separate panel of this court's rejection of the merits of appellants' claim of prosecutorial misconduct in their petition for a writ of mandamus. *Litman and Portnoy v. Weber,* No. 81-1526 (3d Cir. April 23, 1981). *See also In re Grand Jury Proceedings (Johanson),* 632 F.2d 1033, 1039 (3d Cir. 1980) (dictum) (suggesting denial of pretrial evidentiary hearing on prosecutorial misconduct is nonappealable because post conviction relief may remedy putative denial of right to impartial grand jury, but holding that the pretrial order did not conclusively determine the issue).

III.

Thus, while we do not hold that denial of a motion to dismiss an indictment on grounds of gross prosecutorial misconduct may never be immediately appealable, the prior disposition of appellants' petition for mandamus renders it

inappropriate for us to consider the merits of appellants' theory. Because the district court's order is not collaterally final under the Supreme Court's *Abney-Helstoski* decisions, we hold appellants' claim is not appealable at this time.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

# United States Court of Appeals

FOR THE THIRD CIRCUIT

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**No. 81-1444**

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UNITED STATES OF AMERICA

v.

S. DAVID LITMAN, ESQUIRE
IRVING M. PORTNOY, ESQUIRE
*Appellants*

(D.C. Crim. No. 81-00016)

---

## Sur Petition For Rehearing

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Present: SEITZ, *Chief Judge*, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*, and GERRY, *District Judge**

---

The petition for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

...../s/ JOHN GIBBONS.....
Judge

Dated: October 28, 1981

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*Honorable John F. Gerry, United States District Judge for the District of New Jersey on panel denial only.

# United States Court of Appeals

FOR THE THIRD CIRCUIT

**No. 81-1444**

UNITED STATES OF AMERICA

vs.

S. DAVID LITMAN, ESQUIRE
IRVING M. PORTNOY, ESQUIRE,
*Appellants*

(D.C. Criminal No. 81-00016)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and HUNTER, *Circuit Judges* and
GERRY, *District Judge**

## JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on September 15, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the within appeal be, and the same is hereby dismissed for want of an appealable order in accordance with the opinion of this Court.

ATTEST:
M. ELIZABETH FERGUSON
Chief Deputy Clerk

September 28, 1981

*Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

IN THE

**UNITED STATES DISTRICT COURT**

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

S. DAVID LITMAN, ESQUIRE
IRVING M. PORTNOY, ESQUIRE

Criminal No. 81-16

## FINDINGS AND OPINION

WEBER, C.J.

For several years in this District an ongoing investigation has been conducted by the Inspectors of the Postal Service on the general subject of mail fraud directed at casualty insurance companies by combinations of lawyers and medical doctors, and their intermediaries. Beginning in 1977 this investigation centered on the practice of false and inflated medical reports and medical bills in support of personal injury claims submitted to casualty insurance carriers by lawyers on behalf of clients who had been referred to the cooperating doctors.

As a result of the investigation successive grand juries had returned indictments for mail fraud against a number of lawyers and medical doctors based on these practices and several lawyers and medical doctors have been convicted after trial or upon pleas of guilty to these charges.

The phase of this investigation pertinent to the indictment of the present defendants began with grand jury subpoenas duces tecum issued in October 1977 to five law firms in Pittsburgh, including the firm in which the two present defendants are associated.

The principal thrust of Defendant's attack on this indictment arises from the participation of Daniel Saccani in the investigation.

Daniel Saccani is an employee of the Insurance Crime Prevention Institute (ICPI) assigned to its Pittsburgh area office. The ICPI is a non-profit corporation organized by the casualty insurance industry, having a membership of about 350 companies or groups of companies but serving the industry at large. Its mission is to investigate and detect fraud against insurance companies. He is a graduate of the University of West Virginia, has held various positions in the field of criminal investigations and specialized training in insurance investigation. He carries an identifying credential of the ICPI which designates him as a "special agent." He has access to the claim files of insurance companies, both members of ICPI and non-members. He also has access to the central files of the "Cleveland Index Bureau" and the "Property Loss Insurance Register", which are central indexes of the insurance industry listing claimants and attorneys for claimants.

Saccani cooperated with the Postal Inspectors in many ways throughout these investigations in ways similar to his activities in the present case. On January 6, 1978 he was taken before a grand jury then considering related cases by an Assistant United States Attorney where he explained the purpose of the ICPI, and his function in the investigation. He was then sworn in before the grand jury as an "agent" of the grand jury, and he swore to maintain the secrecy of its proceedings. He continued thereafter to assist the Postal Inspectors in the investigation of these matters, principally by serving as a liaison between them and the various insurance companies, identifying and locating pertinent files, checking names through the Cleveland Index, assisting at witness interviews, and otherwise making his expertise and his industry connection available to the investigating officers.

This matter was first brought before this member of the Court on January 30, 1981, when a Motion to Quash Grand Jury Subpoena Duces Tecum was presented on behalf of the law firm of defendants, and a Motion to Disband the Grand Jury or in the Alternative to Seal the Indictment was presented by counsel on behalf of defendant S. David Litman. The return of the subpoena was stayed and a hearing was set for Monday, February 2, 1981 on both motions, to be held *in camera* because of the ongoing grand jury proceedings, the allegations of breach of grand jury secrecy, and the allegation of prosecutorial misconduct. The United States filed a reply and both parties filed briefs over the weekend and the hearing began at 8:20 A.M., Monday, February 3, 1981. The Court was informed that an appointment had been made with an Assistant Attorney General of the United States for a conference between counsel for S. David Litman and the Assistant United States Attorney for that afternoon in Washington.

The court informed counsel that it would continue to hear matters *in camera* related to the alleged breaches of grand jury secrecy, that it would consider further *in camera* proceedings with relation to other charges of prosecutorial misconduct, and recessed the meeting until Tuesday, February 3, 1981 at 8:30 A.M., on the return of counsel from Washington.

On February 3, 1981, being informed that the Attorney General would take no action because the matter was now before a judge of the District Court, the court proceeded. On the presentation of an adequate Schofield affidavit by the Assistant United States Attorney the court denied the motion to quash the subpoena duces tecum. The court refused to disband the grand jury but instead ordered that any indictment be sealed and that further proceedings relating to grand jury matters would be held *in camera.*

Related cases involving other lawyers and medical doctors were investigated and prosecuted in 1978, 1979 and 1980, but

the investigation of the present defendants began in 1980, and the grand jury which heard the evidence and returned the indictment against these two defendants was empaneled on May 23, 1980.

On February 3, 1981, the grand jury returned an indictment charging S. David Litman, Esq., and Irving M. Portnoy, Esq., with conspiring with others known to the grand jury to refer clients of the law firm to three medical doctors for treatment and evaluation of accidental injuries. It charged that these three doctors would furnish false and inflated medical bills and reports which misrepresented the nature and extent of medical treatment they allegedly furnished the clients, and the defendants would furnish these reports to various insurance carriers in support of personal injury damage claims. The three doctors would then receive portions of the proceeds of the settlment claims received by the law firm. Each of these medical doctors have entered pleas of guilty to similar charges in cases involving other attorneys and have cooperated with the government in the investigation of the present matter. In the execution of the scheme it is charged that matter would be transmitted and caused to be transmitted by the United States Postal System. In addition to the conspiracy count, 18 substantive counts are alleged.

Upon its return the indictment was sealed and Defendant S. David Litman's counsel presented a new and improved Motion to Dismiss Indictment, to Suppress Evidence and for Other Appropriate Sanctions. Counsel for the other Defendant, Irving M. Portnoy, filed a motion to join in Defendant Litman's motion, and attended all hearings but did not participate. He reserved the right to file other pretrial motions on his behalf after the disposition of the pending motions.

Evidentiary hearings were held *in camera* on February 23, 24, 25, March 2 and 3, 1981. The Court attempted to and was partially successful in restricting these hearings to the subject

matter of the allegations of violations of Federal Rule of Criminal Procedure 6(e), which it considered appropriate for *in camera* consideration. However, in the course of the extended testimony some matters touching on other grounds advanced by defendant for dismissal were raised. The Court heard testimony of Postal Inspector Siano, who was the Postal Service Inspector in charge of this case; Daniel B. Saccani, the Insurance Crimes Prevention Institute "special agent" whose activities form the principal basis of the charge of violation of grand jury secrecy made here; Dr. Norbert F. Dobrowolski, one of the physicians involved in the alleged conspiracy; United States Attorney Robert J. Cindrich; Stephen B. Shiffrin, Esq., Assistant Director and General Counsel of the Insurance Crime Prevention Institute; and Richard Baldwin, Senior Regional Manager of the Insurance Crime Prevention Institute. Numerous other witnesses subpoenaed by the Defendant were not heard because the Court determined that their testimony would not be relevant to the issue of violation of grand jury secrecy, or was merely cumulative. A large volume of exhibits was introduced, much of which consisted of files of daily reports of activities, charts and schedules.

## FINDING OF FACT

1. In 1977 Postal Service Inspectors in Pittsburgh were engaged in the investigation of schemes involving fraud on insurance companies by the presentation of false and inflated damage claims by lawyers and medical doctors in which the mails were used.
2. Daniel B. Saccani was at that time and since an employee of the Insurance Crime Prevention Institute, a nonprofit association of the casualty insurance industry having its purpose the assistance of law enforcement agencies in the investigation of fraud involving insurance claims. He carried identifying credentials as a "special agent" of the ICPI.

3. Daniel B. Saccani was not at any relevant time an employee of the Federal Government.
4. Daniel B. Saccani, by virtue of his employment, has access to the claim files of casualty insurance companies, both members of the ICPI and non-members. Saccani also has access to certain industry records and indices known as the "Cleveland Index Bureau" and the "Property Insurance Loss Register" which maintains indexes of claimants and attorneys against all insurance companies.
5. Between mid-1977 and January 1981, Saccani was requested to and did assist inspectors of the United States Postal Service in Pittsburgh, Pa. in the investigation of mail fraud involving insurance claims.
6. Saccani was aware that the United States Attorney had subpoenaed for the grand jury the records of five law offices, including that of the defendants herein, Litman, Litman, Harris & Specter (the Litman law firm).
7. The records of the Litman law firm consisting of medical reports and checks paid to medical doctors obtained by grand jury subpoena were seen by Saccani in the course of the investigation from and after November 1977.
8. On January 6, 1978, Saccani appeared before a then sitting grand jury investigating insurance fraud through the mails, was sworn, identified himself as an employee of the Insurance Crime Prevention Institute, explained the function of the ICPI, and was appointed by the grand jury as a "agent" of the grand jury for the purpose of assisting postal inspectors in the investigation of mail fraud arising from schemes to defraud insurance companies.
9. Saccani was instructed about the secret nature of the grand jury proceedings.
10. The grand jury which appointed Saccani as its agent was not the one which returned the present indictment against S. David Litman and Irving M. Portnoy.

11. Thereafter for a period of over three years Saccani worked together with Postal Inspectors, supplying materials from his own resources, such as insurance industry indexes and claim files, and reviewing material subpoenaed by the grand jury, identifying potential witnesses, and sometimes accompanying Postal Inspectors in their initial interviews, having access to memoranda of initial interviews of potential witnesses, serving subpoenas duces tecum on witnesses to appear before the grand jury in earlier cases involving other defendants involved in related investigations as well as in the case involved in the present indictment.
12. Saccani aided the Postal Inspectors and the Assistant United States Attorneys in identifying files of particular insurance companies, which would be useful in the investigation, locating the files, and furnishing information to the Assistant United States Attorney necessary to prepare the duces tecum subpoenas for the insurance companies for the production of the specific claim files secured.
13. Saccani had access to the insurance company claim files after they were subpoenaed by the grand jury and utilized this opportunity to find and identify documents for the Postal Inspectors, which would be relevant and useful in further investigation.
14. On September 18, 1980, Postal Inspector Siano completed a "Summary of Evidence" which recited evidence secured by interviews of witnesses, from the debriefings of certain witnesses who agreed to cooperate after their pleas of guilty to similar charges, and from grand jury testimony of certain witnesses (although it is not clear whether all of this testimony was given before the grand jury which returned this indictment or a prior grand jury). Saccani was permitted to review a copy of this letter.
15. On September 22, 1980, a meeting was held between United States Attorney Cindrich, Assistant United States

Attorney Curry who conducted these grand jury proceedings, and Postal Inspector Siano, to discuss the development of this case. The meeting was held in the Postal Inspector's Office where the documentary material was maintained. From time to time Saccani was present at this meeting and Saccani very likely overheard discussions of the grand jury testimony of certain of the witnesses.

16. Sometime after the meeting of September 22, 1980, United States Attorney Cindrich discussed with First Asst. U.S. Attorney Johnson and Assistant U.S. Attorney Curry the involvement of Saccani with the ongoing grand jury proceeding and was informed by Curry that Saccani's involvement had been "pretty extensive and he had been there for a long time. "

17. On November 14, 1980, United States Attorney Cindrich wrote a "Report of Loss, Compromise or Suspected Compromise" to the Assistant Attorney General for Administration of Justice, pursuant to D.O.J. Order 2000.4 in which he reported that there are any number of possible 6(e) problems arising out of the lawyer-doctor Insurance Mail Fraud Investigations. He recited that the ICPI investigator's presence at extensive pre-grand jury debriefing made the investigator aware of the full extent of testimony without reference to the grand jury transcript. A copy of the letter was delivered to the undersigned as Chief Judge and was held in his file under seal.

18. In November and December 1980, Saccani continued to assist Postal Inspectors but after receipt of the opinion in *United States v. Tager*, (10th Cir. October 20, 1980) in mid-November 1980 he was no longer given access to new grand jury materials received.

19. During the course of the investigation documents subpoenaed by the grand jury, particularly medical bills and reports, were shown to client/patients of the Litman firm and the cooperating doctors, to insurance adjusters, to

employees of the doctors, to attorneys representing insurance companies, defendants in related actions, and to prospective witnesses, outside the presence of the grand jury.

20. From 1977 until the present Saccani reported to his superiors on a daily basis giving a summary of his activities, including his work on related cases and the present case, noting expected times of grand jury presentments, issuance of subpoenas, summaries of meetings with Postal Inspectors and members of the United States Attorney's staff.
21. Saccani was never present in the grand jury room except in the capacity of a sworn witness.
22. Saccani never saw nor read any transcript of testimony before the grand jury.
23. Saccani never disclosed any information concerning the investigation, whether it pertained to grand jury matters or to general matters concerned with the investigation of this or other related cases, except for the brief activity reports to his superior in the ICPI. No disclosure of any kind was made to the insurance companies involved.
24. No media publicity of any kind appeared revealing the existence of the specific grand jury investigation or any grand jury investigation.
25. The existence of a postal service investigation into the general subject of lawyer-doctor insurance fraud was known to a large number of persons including client-patients of the law firms, employees of doctors, insurance claim adjusters, other lawyers who were indicted, doctors who were investigated and/or indicted, and lawyers representing such parties. Indictments pleas and trials of several doctors, lawyers and intermediaries on related and similar charges have been going on for the past several years in this court, and the doctors named in this indictment as participating have been involved in the trials of

other lawyers and have themselves entered pleas of guilty to similar offenses in other cases.

26. The members of the Litman law firm were all aware of the investigation, the interviews of their clients, the doctors and their employees, runners employed by the law firm, and associates and employees of the firm. The firm and individual members of the firm under investigation were represented by outside counsel, and outside counsel for the Litman firm had secured a commitment from the United States Attorney by May of 1980 that the United States Attorney would proceed to a presentment to the grand jury expeditiously or discontinue the investigation, and that subpoenas would be issued in the least obtrusive manner. A new grand jury was empaneled and began hearing testimony on the Litman firm's activities on May 23, 1980, and on September 22, 1980 the United States Attorney decided to proceed to a presentment against members of the Litman firm.
27. There is no evidence of prejudice to any individual arising through disclosure of any matters occurring before the grand jury.

## CONCLUSIONS

I conclude that there have been repeated and continued violations of the provision of Federal Rule of Criminal Procedure 6(e)(2) from and after its effective date of August 1, 1977 until the return of the indictment, which concerned the proceedings of several grand juries sitting in this District since that time which considered allegations of mail fraud by combinations of lawyers and medical doctors and their associates in presenting false and fraudulent medical reports and bills for services to insurance companies in support of claims made. Because of the related nature of these cases and the appearance of the same doctors in several of the related cases it is impossible to segregate the grand jury testimony between the cases, but

it is certain that some of the violations occurred with relation to the grand jury empaneled May 23, 1980 which returned the instant indictment against the present defendant.

Unlike pregnancy, the violation of rule 6(e)(2) is a matter of degree. There is no evidence here of a violation of the first degree, the direct disclosure of the actual testimony of a witness appearing before the grand jury or the invasion of the grand jury premises by an unauthorized person during the presentation of testimony.

The actual second degree violations are of a hearsay nature, the disclosure of the nature or content of a witnesses' testimony by a person authorized to have access to a person not so authorized, either directly, orally, or in writing, or in circumstances where it can be overheard.

There is a third degree of alleged violation which we will classify as "arguable" violations which consist of the inspection of documents subpoenaed before a grand jury by an unauthorized person. In many instances in this case this inspection was made by a person who otherwise would have access to this material by virtue of his occupation. In a sense it is his own business records that he has examined albeit they have been produced under grand jury subpoena.

A fourth degree of alleged violations which we also classify as "arguable" consist of the presence of the non-government employee at interviews of potential witnesses during the investigative phase of these cases before any grand jury testimony was taken. In these instances the witness was shown a document (usually a medical bill) procured by the use of a grand jury subpoena. It is in these extenuated circumstances that the connection with "matters occurring before the grand jury" are argued.

For the purpose of our determination of the violation of rule 6(e)(2) we will assume that all these degrees are violations

of Rule 6(e)(2), but for the purpose of determining the motion to dismiss we will consider the degree, extent, nature and circumstances of the violation.

## THE DISCLOSURE OF GRAND JURY DOCUMENTS

I use the term "arguably" by design because I do not find the cases in agreement that grand jury documents are not necessarily and always prohibited from disclosure by Rule 6(e).

A number of cases have held that documents subpoenaed before the grand jury sought for their own "intrinsic value" and not to discover what has gone on in grand jury proceedings are not protected by the secrecy provisions of Rule 6(e):

*United States v. Interstate Dress Carriers*
280 F.2d 52 (2d Cir. 1960)
*United States v. Stanford*
589 F.2d 285 (7 Cir. 1978)
*cert. den.* 440 U.S. 983
*Capitol Indem. Corp. v. First Minnesota Const. Co.*
405 F.2d 929 (D.C. Mass 1975)
*United States v. Saks & Co.*
426 F. Supp. 812 (S.D.N.Y. 1976)

In *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972) where the information sought was contained in 23,000 file binders, each relating to an individual mortgage transaction, the court found "that the file binders existed as an entity apart from the grand jury, that the information contained in them did not reflect upon and was not inextricably intertwined with the deliberation or work of the grand jury, and that disclosure of them could be accompanied without suggesting some specific act, thought, or focus of the grand jury." *See*, 50 ALR Fed. 675, at 683; *See also, United States v. Weinstein*, 511 F.2d 622 (2d Cir. 1975) *cert. den.* 422 U.S. 1204.

A large amount of the documentary material which was subpoenaed by the grand jury consisted of claim files of various

insurance companies which the ICPI agent was able to identify and locate for the postal inspectors, and for which he supplied the necessary information as to the location and custody for the purpose of subpoena. These files were always available to him in his capacity as agent for the ICPI, both from member insurance companies and from nonmember companies which always cooperated. The ICPI agent reviewed these files in his capacity of an expert to identify for the postal inspectors the documents evidencing fraudulent claims, medical bills, doctors reports and the like. The ICPI agent developed criteria to aid in identifying fraudulent claims. Together with the postal investigator, documents from these files, primarily medical bills, were shown to the patient/clients of the doctor/lawyer teams involved.

> In order to accept the argument...that Rule 6(e) applies to forbid disclosure of the requested documents it would be necessary to conclude that the Rule prevents disclosure *for any purpose*. We cannot so conclude, however, because the policy of secrecy is not absolute. *United States v. Stanford,* 589 F.2d 285, 291 (7th Cir. 1978), cert. denied 440 U.S. 983 (1979). Rule 6(e) shields solely "matters occurring before the grand jury." It is designed to protect from disclosure only the essence of what takes place in the grand jury room in order to protect the freedom and integrity of the deliberative process. *See, e.g. United States v. Proctor & Gamble*, 356 U.S. 677, 681 (1958; *United States v. Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954). The Rule is not intended "to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury." *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). The mere fact that a particular document is reviewed by a grand jury does not convert it into a "matter occurring before a grand jury" within the meaning of 6(e). Documents such as the business records sought by the Commission here are created for purposes

independent of grand jury investigations, and such documents have many legitimate uses unrelated to the substance of the grand jury proceedings. *See, United States v. Stanford*, supra, at 291.

*In re: Grand Jury Investigation New Jersey State Commission of Investigations*, 630 F.2d 996 (3d Cir. 1980), the matter was returned to the district court to evaluate whether disclosure would reveal "matters occurring before", or the control of grand jury proceeding.

In *United States v. RMI Co.*, 599 F.2d 1183 (3d Cir. 1979), where the district court had denied disclosure of documents subpoenaed from a party not indicted, the Court of Appeals noted that a third party producing documents to a grand jury ought to be able to rely on the secrecy requirement to prevent the disclosure of its material to others, but nevertheless remanded the matter to the district court to review the merits of the third party's objection to disclosure.

In *United States v. Armco Steel*, 458 F. Supp. 784 (W.D. Mo. 1978), the court refused disclosure of witness interviews and memoranda prepared by the Department of Justice for a grand jury in a criminal anti-trust proceeding, where the defendant entered a plea of nollo contendere, to government attorneys seeking their disclosure in a government civil anti-trust suit against the same defendant because the memoranda summarized what had happened before the grand jury.

When we consider a rule we must consider the reason for the rule. We older lawyers who had to read Cicero before we went to college say "cessante ratione legis, cessat et ipsa lex." For more benighted later generations, Judge Aldisert adopts a free translation from Karl Llewellyn: "The rule follows where its reason leads; where the reason stops, there stops the rule." *See, United States v. Criden*, 633 F.2d 346, 356 (fn. 6) (3d Cir. 1980).

The most recent statement of the reasons for the rule of secrecy of grand jury proceedings.

> Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of matters occurring before the grand jury except when it is directed by the court, is made to the attorneys for the government for use in the performance of their duties, or is made to government personnel deemed necessary to assist an attorney for the government in performance of his duty to enforce federal criminal law. The rule is designed to protect grand jury secrecy and was adopted to implement the traditional reasons for cloaking grand jury proceedings: (1) to prevent the accused from escaping and from tampering with witnesses; (2) to protect the reputation of an accused who is not indicted; (3) to encourage witnesses to appear and speak freely; and (4) to encourage jurors to engage in uninhibited investigation and deliberation. *See Pittsburgh Plate Glass Co. v. United States*, 1959, 360 U.S. 395, 405, 79 S.Ct. 1237, 1244, 4 L.Ed. 2d 1323, 1330 (Brennan, J. dissenting); *United States v. Proctor & Gamble Co.*, 1958, 356 U.S. 677, 681 n. 6, 78 S.Ct. 983, 986, 2 L.Ed. 2d 1077.
>
> *United States v. Malatesta*, 583 F.2d 748, 752 (5th Cir. 1978).

*See also United States v. Rose*, 215 F.2d 617, 628 (3d Cir. 1954).

That court has elaborated on one reason: that a third party originally furnished the documents in reliance on the secrecy provisions of Rule 6(e), and thus the policies behind Rule 6(e) secrecy are broken by the disclosure to some other party outside the boundaries of Rule 6(e). *United States v. RMI Co., supra.* That reason does not apply to the content of insurance company files in the present case where it is the party producing the document to whom disclosure was made.

## DISCLOSURE OF GRAND JURY DOCUMENTS TO PROSPECTIVE WITNESSES

It is argued here and we have so found that documents subpoenaed by the grand jury were shown to prospective witnesses (irrespective of their examination by Saccani). The documents shown generally encompass medical reports or bills for medical services submitted by the doctors through the lawyers to insurance companies. There is no evidence that anyone was shown anything other than his own purported bill or report. In *United States v. Stanford, cit. supra,* a similar situation was revealed involving welfare applications:

> The disclosures challenged here revealed nothing about the grand jury investigation, and the disclosures were made only to persons legitimately connected with the documents. The documents revealed to the defendants were not described by the agents during the interviews as grand jury documents. Each defendant was shown only his or her own employment file, his or her own welfare applications, and his or her own endorsement on the warrants. For these reasons, the disclosure falls outside the scope of Rule 6(e). Because the documents shown were not otherwise sheltered from the defendant's inspection by any form of privilege, *cf. United States v. Weinstein,* 511 F.2d 622, at 627; *In Re Grand Jury Investigation,* 210 F. Supp. 904 (S.D.N.Y. 1962), the defendants challenge to these disclosures must fail. 589 F.2d at 291.

We come to the same conclusions here in considering the motion to dismiss.

## THE ALLEGATION OF MEDIA DISCLOSURE

On the evening of December 5, 1978, Charles Bosworth, an investigative reporter for KDKA-TV 2, presented two reports dealing with personal and business relationships of Roslyn Litman, wife of defendant S. David Litman and a

member of the Litman firm.[1] At the time of these reports Mrs. Litman was a candidate for appointment to the federal bench. In his reports Bosworth alluded to the fact that "someone in the Litman firm is a top suspect in a massive insurance fraud case." In addition Bosworth noted that, although David and Roslyn Litman were also considered as suspects in this case, they were not the targets of the investigation. This is the only media disclosure naming an member of the Litman firm brought to our attention in the extensive hearings on this matter.

The defendant now moves to dismiss the present indictment on the grounds that these news reports constituted violations of Rule 6(e) and prejudiced community attitudes toward the Litmans. In support of this motion the defendant alleges that two United States officials, Assistant U.S. Attorney Thomas Crawford and Postal Inspector Jack Grochot, disclosed grand jury information to Bosworth and that this grand jury information formed the basis of the December 5, 1978 newscast.

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[1]In the 6 p.m. broadcast Bosworth said:

> "But there are more serious problems developing within the Litman law firm. One member of the firm is a top suspect in a massive insurance fraud case. Lawyers and doctors allegedly conspired to cheat insurance companies on medical claims.
>
> While neither Roslyn nor David are targets at this time, one other person who is a target is Dr. M.A. Rosenbloom. Dr. Rosenbloom is related to the Litman's through marriage, keeps his office in a building put up by Eugene Litman (Roslyn Litman's brother-in-law), lives in a condominium developed by Eugene Litman, and has been a business associate of Eugene Litman and other members of the family."

In the 11 p.m. broadcast Bosworth said:

> "Then there's this: Someone in the Litman law firm is a top suspect in a massive insurance fraud case. And two of the doctors involved in the case are connected to the Litman family through marriage, business, or both. I have further learned that Mr. or Mrs. Litman may also be suspects, although they are not targets of the investigation at this time."

We have concluded, however, on the basis of the evidence already obtained through examination of transcripts of the broadcasts and the *in camera* proceedings that the defendant has not established a prima facie case of improper disclosure in violation of Rule 6(e). Accordingly we will deny the defendant's motion to dismiss to the extent that that motion rests on alleged disclosures to the media.

It is clear that "(a) criminal defendant who seeks to obtain dismissal of an indictment ... bears a heavy burden in attempting to justify such relief." *In re Grand Jury Investigation (Bert Lance)*, 610 F.2d 202, 219 (5th Cir. 1980); *see also United States v. Criden*, 633 F.2d 346, 354 (3d Cir. 1980). In cases where the movant seeks dismissal of an indictment because of alleged disclosures by the government to the media that "heavy burden" requires, at a minimum (1) "a clear indication that the media reports disclose information about 'matters occurring before the grand jury' ", *Lance, supra*, at 216; and (2) proof that the "article or articles... indicate the source of the information revealed to be one of those proscribed by Rule 6(e)", i.e. a grand juror, interpreter, stenographer, a typist who transcribes testimony, an attorney for the Government or any other person to whom disclosure is made in accordance with Rule 6(e). *Lance, supra*, at 217.

In this case we feel that the defendant's proof is fatally deficient on both of these elements. For example, the record developed in the *in camera* hearing in no way clearly indicates that the Bosworth broadcasts were based on grand jury information. Quite the contrary, review of the full transcripts of those broadcasts reveals that no reference to any grand jury investigation, or even to the existence of a grand jury, was ever made. In fact the grand jury which eventually indicted the defendants was not even in existence at the time of the Bosworth reports.

Nor does Bosworth's use of the words "investigation" and "target" lead to the conclusion that grand jury information has been disclosed. At the time of the Bosworth report the Postal Service was conducting an extensive investigation into the area of Doctor/Lawyer insurance fraud. This investigation was distinct from any specific grand jury proceeding and was not enshrouded with the same strict secrecy that surrounds the grand jury. *See generally In re Search Warrant Second Floor Bedroom,* 489 F. Supp. 207, 211 (D.R.I. 1980) (distinguishes grand jury investigation from other governmental investigations or purpose of Rule 6(e)).

Therefore, general knowledge of this investigation was properly in the public domain. Any reference to "targets" of "investigations" could easily refer to these postal inspector interviews where a law enforcement agent must inform a party if he is a "target" of an investigation and give him a Miranda warning.

Finally, even if Bosworth's reports did refer to a grand jury investigation, we would not find this disclosure to be violative of Rule 6(e). When read in their entirety, these reports do little more than announce the existence of an investigation into insurance fraud involving the Litman firm. In our view, mere disclosure of the existence of a grand jury investigation does not constitute a "matter occurring before the grand jury." Accordingly we conclude that the defendant's proof on this initial issue is wholly deficient.

However, even if we assumed that Bosworth's report was based on grand jury information we would still deny the defendant's motion because he has not shown that this information was obtained from one of proscribed sources under Rule 6(e). The testimony at the *in camera* hearing revealed the following facts: Neither Assistant U.S. Attorney Crawford nor Postal Inspector Grochot was in any way involved in the grand jury investigation of the Litman firm. All of the government

officials who were called at this *in camera* hearing denied making any disclosure of grand jury information to either Bosworth or Crawford and Grochot. A large number of witnesses were called before the grand jury. These witnesses, who included doctors, employees of doctors, clients, attorneys, and employees of attorneys, would have all been privy to matters occurring before the grand jury. None of these witnesses would be barred from disclosing grand jury information. *See In re Investigation Before April 1975 Grand Jury.* 531 F.2d 600 (D.C. Cir. 1976).

In essence then the evidence adduced in these *in camera* proceedings reveals that Crawford and Grochot, the alleged sources of grand jury material, were in no way involved with the Litman grand jury investigation. It further reveals that none of the government officials involved in the investigation disclosed any grand jury material to Bosworth. Finally, it demonstrates that a large number of grand jury witnesses, witnesses who were not barred from making any disclosure, had access to matters occurring before the grand jury. On this record, we cannot conclude that the defendant has met his heavy burden of proof as to the source of the alleged disclosure.

In an effort to buttress its position on this point defendant offered, at this *in camera* hearing, to present hearsay testimony to the effect that Bosworth had revealed knowledge of the ongoing investigation by postal authorities of a mail fraud case on August 17, 1978. There was no mention in that offer of the source. (See T. p. 764). This offer adds little to the defendant's case. We note that even an allegation by a reporter that his information was obtained from a "government source" is insufficient to establish a violation of Rule 6(e). *See e.g. Special April 1977 Grand Jury,* 587 F.2d 889, 892-93 (7th Cir. 1978), ("[N]ews reporters, as all the world knows, invariably attribute the information they receive to 'confidential' sources and in connection with stories of this nature, to unnamed sources

'close to investigation'"). *United States v. Mitchell,* 372 F. Supp. 1239 (S.D. N.Y. 1973) (media reference to "sources close to the investigation" held inadequate to establish that government officials disclosed material); *United States v. Archer,* 355 F.Supp. 981 (S.D. N.Y. 1972), *rev'd on other grounds* 486 F.2d 620 (2d Cir. 1973) (media reference to "informed sources" held inadequate); *United States v. Kahaner,* 204 F. Supp. 921 (S.D. N.Y. 1962), *aff'd* 317 F.2d 459 (2d Cir. 1963) (media reference to "official" source held inadequate); *United States v. Sweig,* 316 F. Supp. 1198 (S.D. N.Y. 1970), *aff'd* 441 F.2d 114 (2d Cir. 1971). But this case is even weaker. The defendant asks us to infer a "government source" solely from the fact that the reporter knew of an ongoing investigation. Without some more particularized showing by the defendant, this unsupported hearsay statement does not demonstrate any improper disclosure of grand jury material by government officials.

Finally, we note that the defendant invited this court to conduct further *in camera* proceedings on the alleged Crawford/Grochot disclosures and had subpoenaed witnesses for this purpose. We decline this invitation. Six days of *in camera* testimony have already been taken on this matter. In this testimony the facts surrounding the involvement of Crawford and Chochot in the Litman grand jury investigations were fully developed. At the end of these hearings the defendant's proof of media disclosures by government officials was found to be totally deficient. Given these facts we feel that no further inquiry into this matter would be useful or necessary. *See, e.g. In re Special Report April 1977 Grand Jury,* supra (dismissal of 6(e) motion without a hearing held proper); *United States v. Archer,* supra (motion to dismiss indictment denied without an evidentiary hearing); *United States v. Sweig, supra* (Motion to dismiss indictment denied without an evidentiary hearing).

## THE DISCLOSURES TO SACCANI

The disclosures to Saccani form the essential part of defendant's case. Assuming *vel non* that a great many of these were violations of Rule 6(e)(2) we must consider factors in mitigation in deciding upon the sanction. Saccani had knowledge of and access to a vast body of evidentiary material essential to this investigation. He was the employee of an organization whose specific purpose was to aid prosecutors in the discovery and prosecution of insurance fraud investigations. He not only knew where to locate the files among the hundreds of insurance companies involved, but he knew what materials in those files were relevant to the investigation. He had access to records and indexes maintained by the insurance industry identifying claimants and lawyers. He knew the business far better than any of the Postal Inspectors.

The need of expert assistance to the prosecuting United States Attorney has been recognized. In *United States v. Stanford,* supra, the government supplied documents secured by grand jury subpoenas to state employees for their analysis by computer experts and accounts.

> In an extremely complex investigation like this one, the United States Attorney requires the assistance of experts. Here the expertise came from the F.B.I., another Justice Department Agency under the same control as the United States Attorney. When the grand jury takes precaution to preserve secrecy as it did here by swearing the F.B.I. personnel as agents and cautioning them on the need for secrecy, we see no reason to put an additional barrier between the grand jury and the evidence by interpreting Rule 6(e) to require a disclosure order.

*United States v. Stanford,* supra, p. 292. In *In Re Perlin,* 589 F.2d 260 (7th Cir. 1978) the need for specialized knowledge in the field of commodity futures trading justified the use of an outside agency in reviewing the grand jury materials. See Com-

ment, *Administrative Agency Lawyers' Presence in the Grand Jury Room,* 128 U.Pa. Law Review 159 for a discussion of the problem.

While we cannot find any specific authority in the statutes or rules for making one an "agent of the grand jury", the practice has been given wide judicial recognition as an element of protection of grand jury secrecy. It was done here, and there is no evidence that Saccani misused or abused the disclosures made to him. There was no publicity, media or otherwise, traced to him. The information furnished to him and his use of it was all necessary to accomplish the purpose of the investigation.

Throughout this proceeding defendant has emphasized the holding of the *United States v. Tager,* F.2d (10th Cir., Oct. 20, 1980, Case No. 79-1691). That case is very similar to the facts of the instant case in that disclosures were also made to an ICPI agent. The disclosures apparently were more far reaching because the ICPI agent was allowed to read actual grand jury transcripts. The case merely held, contrary to the ruling of the lower court, that the disclosures violated Rule 6(e). The Court did not purport to define in any detail which specific disclosures constituted "matters occurring before the grand jury" nor did it suggest in any way, that these 6(e) disclosures required dismissal of the indictment. The Court of Appeals remanded the case to the District Court for further consideration of these issues.

## DISMISSAL OF INDICTMENT

The sanction provided by Rule 6(e)(2) is: "A knowing violation of Rule 6 may be punished as a contempt of court." In an exhaustive search of cases involving Rule 6 violations we have never found one where a pretrial dismissal was ordered for a violation of Rule 6 unattended by other egregious prosecutorial misconduct, nor have we found any where dismissal or

a new trial was ordered on a post-trial motion raising the same grounds. Many of these cases have involved widespread, frequent and continuous media disclosures of grand jury matters directly attributable to the prosecutors. We have attempted to classify these cases as follows:

(i) *Cases dealing with Rule 6(e) violations involving widespread media reports based on information unlawfully disclosed by government attorneys where pretrial dismissal was sought:*

*United States v. Kahaner,* 204 F. Supp. 921 (S.D. N.Y. 1962), *aff'd* 317 F.2d 459 2d Cir. 1963), *cert den.* 375 U.S. 835.
Motion denied. The news articles did not disclose access to grand jury matters.

*United States v. Archer,* 355 F. Supp. 981 (S.D. N.Y. 1972)
Motion denied. There was no proof of government disclosure of grand jury material and no showing of prejudice to the defendant.

*United States v. Mitchell,* 372 F. Supp. 1239 (S.D. N.Y. 1973)
Motion denied. The news articles do not identify with particularity a grand jury source.

(ii) *Cases involving pretrial attack on indictment for 6(e) violations with no media publicity:*

*United States v. Dondich,* 460 F. Supp. 849 (N.D. Cal. 1970)
Motion to dismiss indictment because of Rule 6(e) violations when SEC lawyer who conducted civil case participated in grand jury proceedings. Denied. No prejudice found and no basis for judicial intervention in prosecutorial process.

*United States v. Weingartner*, 485 F. Supp. 1167 (D. N.J. 1979)

Motion to Dismiss Indictment et al., alleging Rule 6(e) violations in that unauthorized persons listened to tape recording played before the grand jury. Denied. No 6(e) violation found.

(iii) *Cases dealing with Rule 6(e)(2) violations involving media disclosures where the movant seeks some other pretrial sanction:*

*In Re Grand Jury Subpoena on Pedro Ardulata* 432 F. Supp. 583 (S.D. N.Y. 1977); 434 F. Supp. 325

Motion to quash grand jury subpoena because of widespread media disclosure by government. Motion denied, because proper remedy was contempt proceeding.

*In Re Grand Jury Investigation (Lance)* 610 F.2d 202 (5th Cir. 1980)

Motion for Contempt Proceedings because of widespread media publicity attributable to government sources. Remanded to District Court for evidentiary hearings.

*In Re Special April 1977 Grand Jury* 587 F.2d 889 (7th Cir. 1978).

Motion to terminate grand jury because of excessive media publicity. Denied because of failure to show with particularity that publicity came from improper Rule 6(e) disclosure.

(iv) *Cases involving Motions for Post Trial Relief (New Trial or Dismissal) where Rule 6(e) violations were alleged:*

*United States v. Bazzano* 520 F.2d 1120 (3d Cir. 1977)

Motion to Dismiss or grant New Trial where grand jury testimony of witness was disclosed to other witness before trial. Denied. No prejudice to defendant shown.

*United States v. Maletesta*
583 F.2d 748 (5th Cir. 1978) *aff'd en banc,*
590 F.2d 1379 (5th Cir. 1979)
Motion to Dismiss or grant New Trial where prior grand jury testimony was read to new grand jury. Denied. Rule 6(e) violation did not justify dismissal or new trial. The sanction is a contempt citation.

*United States v. Stanford*
589 F.2d 285 (7th Cir. 1978)
Motion for Dismissal or grant of New Trial because of extensive government disclosures of grand jury documents to state employees for investigation of welfare fund. Motion denied.

*United States v. Concrete Products*
425 F.2d 1241 (5th Cir. 1973)
Motion to dismiss because witness was supplied with grand jury exhibits before his grand jury testimony. Denied. The violation does not justify dismissal; contempt is the proper sanction.

*United States v. Thomas*
593 F.2d 615 (5th Cir. 1979)
Motion to Dismiss because of grand jury disclosures to IRS and Dept. of Agriculture. Denied. This was not a Rule 6(e) violation but even if it were, no prejudice to defendant is shown and contempt is the appropriate sanction.

*United Sates v. Hoffa*
399 F.2d 20 (6th Cir. 1965)
Motion to Dismiss Indictment because of improper disclosures of grand jury minutes to other government agents. Denied. This is no Rule 6(e) violation and even if it were it is not prejudicial and the only sanction is contempt.

*United States v. Birdman*
602 F.2d 547 (3d Cir. 1979)
Motion to Dismiss Indictment because of appearance of a government attorney before the grand jury both as a witness and as a prosecuting attorney, although he was not an employee of the Department of Justice. Denied. No showing of actual prejudice and dismissal is not the proper sanction.

*United States v. Stone*
633 F.2d 1272 (9th Cir. 1979)
Motion to Dismiss Indictment. Testimony of one grand jury read to another grand jury. Denied. This was a violation of Rule 6(e) but does not warrant dismissal of indictment. Contempt is the proper sanction.

*United States v. Schiavo*
325 F.Supp. 475 (E.D. Pa. 1974)
Motion for New Trial based on disclosure of grand jury proceedings. Denied. Even if there was improper disclosure the remedy should not be a new trial but to punish the offending party in a contempt proceeding.

(v) *Cases Granting Dismissal:*

*United States v. Treadway*
445 F. Supp. 959 (N.D. Tex. 1978)
Pretrial Motion to Dismiss. Granted. A 6(d) violation found where government attorney testified as a witness and remained before grand jury as a prosecuting witness.

*United States v. Carcaise*
442 F. Supp. 1209 (M.D. Fla. 1978)
Pretrial Motion to Dismiss. Granted because of impropriety of prosecutors in reading summaries of depositions before grand jury. The court stated that allegations of allowing investigators and accountants access to grand jury materials, and the reading of prior grand jury testimony to another grand jury were Rule 6(e) violations but would not justify dismissal.

*United States v. Gold*
470 F. Supp. 1136 (N.D. Ill. 1979).
Pretrial Motion to Dismiss. Granted. While there were Rule 6(e) violations on disclosures, there was also a 6(d) violation because of the dual role of prosecutor and witness, and other prosecutorial misconduct.

(vi) *Other Rule 6(e) Cases:*

*In Re Paul Perlin*
589 F.2d 266 (7th Cir. 1978).
A showing of real conflict of interest which prejudiced the party complaining must be made, where an agent of another government bureau interested in the civil aspect of the case is given access to grand jury materials. None were shown here and the Court held a recalcitrant grand jury witness in contempt for failure to testify.

*In Re Search Warrant for Second Floor Bedroom*
489 F. Supp. 207 (D.R.I. 1980)
Motion to unseal affidavit for search warrant sealed to protect grant jury materials. Warrant ordered unsealed because affidavit only contained information from investigative memos of witnesses prior to their grand jury testimony. This is not material covered by 6(e). "Reading Rule 6(e) to cover government investigation that may lead to grand jury probe would raise a host of questions about the scope of such secrecy, questions which Rule 6(e) does not purport to answer." (p. 211).

In conclusion, the overwhelming weight of authority denies the remedy of dismissal on the basis of violation of Rule 6(e). Most cases point to the sanction provided by the Rule itself, many cases refer to the lack of evidence of prejudice to the defendant.

A criminal defendant who seeks to obtain dismissal of an indictment, a person subpoenaed to testify before a grand jury who requests the court to quash the subpoena, or the target of an ongoing grand jury investigation who seeks to

have the grand jury dismissed, bears a heavy burden... Punishment for the contempt of court is the sanction specifically authorized by Rule 6(e)(1) for violation of its provisions, and a contempt sanction will generally provide an adequate remedy for such violation.

*In Re Grand Jury Investigation (Bert Lance),*
cit. supra p. 219.

However, to attempt to serve a public interest in the purity of the grand jury proceeding, by the per se sanction of dismissing indictments, is to disserve another public interest by frustrating prosecution of criminals.

*United States v. Birdman*
602 F.2d 547 (3d Cir. 1979).

In sum, viewing the various grand jury contentions collectively, and to some considerable extent individually, our acceptance of them could substantially nullify, particularly in a case of any complexity, one of the basic purposes of this body, that of thorough knowledgeable investigation of the matters before it. This group of lay persons should not be locked into a position which lacks full comprehension of the factual situations as to which they are inquiring. Being of the opinion that the secrecy requirements have not dictated this result here, we decline to do so by judicial gloss.

*United States v. Stanford*
cit. supra, p. 293

We find no reason to support dismissal here.

## THE MOTION TO STRIKE SURPLUSAGE

Defendant Litman has also filed a motion to strike certain language in the indictment as surplusage under Rule 7(d). A motion to strike surplusage will be granted only where it is clear that the allegations are not relevant to the crime charged, and are inflammatory and prejudicial. *United States v. DiPalma,* 461 F. Supp. 778 (S.D.N.Y. 1978); *United States v. Brighton Building & Maintenance Company,* 435 F. Supp. 222 (N.D. Ill. E.D. 1977).

Defendant claims that reference to payments "to persons other than attorneys who referred personal injury cases" (para. 6, page 2 of indictment), "to investigators, persons who referred cases to Litman, Litman, Harris & Spector and others" (para. 14, page 3) and all of para. 13, page 5 of the indictment which refers to payments to "others" should be stricken. Defendant claims these references charge no offense, have no relationship to the conspiracy alleged, and serve no purpose except that of inflaming public sentiment.

These statements, however, refer to allegations that fees were split with others who participated in the alleged conspiracy. The evidence shows that some of the alleged runners were witnesses before the grand jury. Their activities were an integral part of the conspiracy and are relevant to the charges made in the indictment.

Defendant also moves to strike many of the paragraphs in the indictment which refer to alleged transactions which are time barred. However, reference to other transactions may be highly relevant to the government's case to establish a pattern and conspiracy. These allegations are an integral part of the criminal activity charged and any resulting prejudice is speculative and is outweighted by the relevance to the government's case. *United States v. Krasnoff*, 480 F. Supp. 723, 730 (S.D.N.Y. 1979).

Therefore, defendant Litman's motion to strike surplusage will be denied.

## OTHER MOTIONS

Finally, in support of his motion to dismiss this indictment, the defendant presents an extensive list of alleged prosecutorial abuses. Specifically the defendant alleges the following abuses by the United States Attorneys's Office: improper preindictment delay; selective prosecution of the defendant on the basis of his religion and age; failure by the prosecutor to present material exculpatory evidence to the grand jury; intim-

idation of grand jury witnesses; efforts to interfere with communication between witnesses and the defendant; and introduction of prejudical material to the grand jury. The defendant further argues that he is entitled to a full *in camera* hearing on all of these allegations. *See, Gannett v. DiPasquale,* 443 U.S. 368 (1979).

We disagree. The charges made by the defendant range from serious to frivolous. To the extent that we have already received *in camera* testimony on some of these allegations, we have found them to be largely unsupported. To examine them further would require extensive *in camera* proceedings, proceedings which would amount to a virtual trial of the government's conduct over the five years of this investigation. *Gannett v. DiPasquale* clearly did not contemplate affording criminal defendants the opportunity to conduct such wide ranging *in camera* inquiries *See, Gannett, supra,* at 382-84.

Furthermore, some of these can be best handled at trial such as intimidation of witnesses, interference with witnesses, and the like. Prejudicial pre-indictment delay can usually only be determined at trial. Exculpatory material can be produced before trial. Counsel for the co-defendant had indicated his desire to pursue any pre-trial motions in the ordinary manner.

Rather than engaging in the extended *in camera* proceedings urged by the defendant, we feel that justice would be better served by denying these motions at this time and proceeding with the trial of this case. The denial of these motions would be without prejudice to their renewal prior to trial in a properly supported pretrial motion. Moreover, upon a showing of particularized need, the court would consider requests for additional *in camera* inquiries into specific allegations of prosecutorial abuse.

This procedure, we feel, would best serve to accommodate the interests of the defendant in avoiding prejudical publicity with the legitimate public interest in the administration of criminal justice.

An appropriate order will issue.

IN THE
**UNITED STATES DISTRICT COURT**
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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|---|---|
| **UNITED STATES OF AMERICA** | |
| **v.** | **Criminal No. 81-16** |
| **S. DAVID LITMAN, ESQUIRE** | |
| **IRVING M. PORTNOY, ESQUIRE** | |

## ORDER

AND NOW this 16th day of March, 1981, the Motions of Defendants to Dismiss are DENIED in accordance with the findings set forth in the Opinion of this date.

All proceedings under this motion, inlcuding the Opinion and Order, shall remain SEALED until further Order of Court, or until the swearing in of a jury in this case.

The indictment shall be UNSEALED on March 20, 1981, at 12 noon, unless an Order of Stay is issued by the Court of Appeals.

/s/ GERALD J. WEBER
GERALD J. WEBER
Chief United States District Judge

cc: David M. Curry, Assistant United States Attorney

David J. Armstrong, Esq.

Harold Gondelman, Esq.

**APPENDIX E**